IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. 705

C. D. SHEPHERD, ET AL.,
Petitioners,

vs.

OBIE FAUSTER HUNTER, ET AL.,
Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Introduction.

In view of the great length of respondents' briefs, we believe it would unduly extend this brief to reply to all matter appearing in the respondents' briefs. We shall therefore confine ourselves to a consideration of what we consider the three most important questions raised thereby, as follows:

1. Whether the Brotherhood of Railroad Trainmen, although a party to the contract enjoined herein and a party to the Adjustment Board Award nullified herein, was nevertheless properly omitted as a party defendant in this suit.
2. Whether there is any valid basis for reconciling the decision of the Seventh Circuit in this case, hold-

ing that one railroad labor group may properly be granted injunctive relief against performance of a labor agreement between the carrier and another group, and the decision of the Eighth Circuit in *Missouri-Kansas-Texas R. Co.* v. *Randolph*, 164 F. 2d 4, holding that such relief may not be granted.

3. Whether Section 3 First (j) of the Railway Labor Act requires that the Adjustment Board, in considering a dispute between a carrier and a class of employees, must give formal notice of its hearings to employees in another class, although they have no right to intervene in the proceeding and have actual knowledge of its pendency.

SUMMARY OF ARGUMENT.

I. The Brotherhood as an Indispensable Party.

In their attempt to show that the Brotherhood was properly omitted as a party to this suit Plaintiffs-Respondents have denied that the Brotherhood was the party which won the Adjustment Board Award under attack in this suit, and have denied that the collective bargaining agreement made by the Brotherhood with the Santa Fe covering the disputed work is being enjoined by this suit. Both of these facts are so clearly shown by the record that it must be concluded respondents have no answer to the contention that the Brotherhood is an indispensable party, and that the District Court had no power to entertain this suit.

II. Conflict Between Seventh and Eighth Circuits.

Plaintiffs-Respondents have attempted to distinguish this case, in which one group of railroad employees has been granted injunctive relief against performance of a labor

contract between the railroad and another employee group, from the Eighth Circuit decision in *Missouri-Kansas-Texas R. Co.* v. *Randolph,* 164 F. 2d 4, in which such relief was denied, by insisting that the injunction granted here does not prohibit performance of any labor agreement. The record unquestionably shows that performance of the April 27, 1944 bargaining agreement between the Santa Fe and the Brotherhood has been enjoined, wherefore no ground has been shown for reconciling the decisions of the two circuits.

III. Notice and Knowledge of the Adjustment Board Proceedings.

Plaintiffs-Respondents' argument that the Railway Labor Act requires formal notice to the porters of the dispute between the Brotherhood and the Santa Fe before the Adjustment Board and that the porters' actual knowledge thereof was immaterial fully justifies the granting of the writ because this view, which was adopted by the Court of Appeals, would require the Board to give notice to persons it has no power to hear, and would put a premium on the practice, heretofore condemned by this Court, of employees' standing by with knowledge of a Board proceeding in order to attack any result which does not please them.

ARGUMENT.

I.

Reply to Respondents' Arguments Concerning the Brotherhood as an Indispensable Party.

We urged in our brief (pages 25-27) that the Brotherhood is an indispensable party to this suit for two principal reasons:

> First, because the Brotherhood is a party to the collective bargaining agreement of April 27, 1944 which specifically promises to brakemen the same work which the respondent porters seek by this suit to secure to themselves, and
>
> Second, because the Brotherhood was the party in whose favor the Adjustment Board Award which is attacked herein was rendered.

As for the April 27, 1944 contract, the porters have answered in their brief (page 53) that "The record fails to show that a collective bargaining agreement of any kind is involved in this suit * * *." The bargaining agreement the porters have lost sight of is their Exhibit 2 (R. 210-216). It is not merely involved in this case; it is the very heart of it, as will be shown in the next section of this reply brief. As for the Adjustment Board proceedings to which the Brotherhood was a party, the porters state in their brief (page 53) that "there is no Award appearing of record made in favor of the Brotherhood * * *." We find the award which the porters have lost sight of attached to the porters' complaint as their Exhibit A, which reads in part as follows (R. 58):

> "Parties to Dispute:
>
> Brotherhood of Railroad Trainmen.
>
> The Atchison, Topeka and Santa Fe Railway Company—Eastern and Western Lines."

This award was plainly entered as provided in Section 3 First (o) of the Railway Labor Act "in favor of petitioner," *i. e.*, the Brotherhood. It would thus appear that the porters, in their zeal to demonstrate that the Brotherhood was properly omitted as a party to this suit, have assumed the position of the legendary ostrich who, after burying his head in the sand, asks "Where is everybody?"

The Santa Fe's argument in its brief (pages 23-25) agrees with the porters that the Brotherhood was properly omitted as a party to this suit, but assigns different reasons. It points out that one of the affidavits offered by the individual brakemen defendants is signed by the General Chairman of the Brotherhood on the Santa Fe, and argues that since the Brotherhood has had actual knowledge of this suit and has not intervened, then to hold that the Brotherhood must be made a party would be to "permit litigants to play fast and loose" with the court (page 24). Of course the Santa Fe cites no authority for the proposition that unless an indispensable party displays his interest by applying for intervention, his rights may be adjudicated in his absence. As for the railroad's charge that there are litigants here who are trying to play fast and loose, the individual brakemen defendants are the only litigants in this case opposing the Santa Fe, so that criticism is apparently aimed at them. These defendants have maintained from the very beginning, in their answer, that the Brotherhood should be made a party (R. 92). It is curious that the Santa Fe, having also solemnly pleaded in its answer (R. 74) that the Brotherhood should be made a party, just as it now pleads the opposite, should choose this occasion to stress the importance of consistency.

We think the conclusion is inescapable that the respondents simply do not have an answer to our contention that the Brotherhood is an indispensable party to this suit.

This issue is obviously fundamental to the district court's jurisdiction to entertain the suit, and its determination is therefore a prerequisite to the further conduct of the case.

II.

Reply to Respondents' Arguments Concerning Conflict Between Seventh and Eighth Circuits.

The essential element of conflict between the Seventh Circuit's decision now sought to be reviewed and the Eighth Circuit's decision in *Missouri-Kansas-Texas R. Co.* v. *Randolph,* 164 F. 2d 4, certiorari denied in 334 U. S. 818, springs from the fact that in each case the carrier agreed with the brakemen's union to assign brakemen to certain braking duties which were then being performed by porters, whereupon in each case the porters brought suit to secure themselves in the disputed work by injunction. Any comparison made between the two decisions must therefore begin with a recognition that the relief granted in this case and denied in the *Randolph* case relates to an injunction against performance of labor agreements.

Of course, a refusal to acknowledge the existence and involvement of the labor agreement in the instant case can only tend to conceal the conflict between the two decisions; it will not reconcile them. Nevertheless, in their brief (page 1) the porters undertook a "more concise, accurate and complete" restatement of the case (pages 1-17) but did not mention the April 27, 1944 contract (Plaintiffs' Ex. 2, R. 210-216). It is obviously the dominant factual element in this case because it specifically covers the disputed work.

The apparent purpose of this omission is revealed at pages 49-50 of their brief, where the porters have flatly stated that the "injunction does not prohibit the enforcement of any labor agreement". This statement is the only

attempt at reconciliation between this decision and the *Randolph* decision. Let us compare this statement by the porters with the following colloquy between Chief Judge Major of the Court of Appeals and Mr. Milroy, attorney for the Santa Fe:

> "Judge Major: Well, isn't enforcement and recognition of that contract covered in this injunction? Under this injunction you can not go on and carry out this contract, can you?
>
> "Mr. Milroy: No, it is all wrapped up together, as I see it, because of the fact that it would not have been entered into except for the award. It was entered into in compliance with the award." (R. 312-313.)
>
> * * * * *
>
> "Judge Major: Well, the porters are getting this work now, aren't they?
>
> "Mr. Milroy: That is correct.
>
> "Judge Major: And I suppose the brakemen are being deprived of it as a result of the injunction issued.
>
> "Mr. Milroy: That is right.
>
> "Judge Major: As long as this injunction stands the porters will continue.
>
> "Mr. Milroy: That is right." (R. 314.)

The porters brought the April 27, 1944 contract as an issue into this case by charging in their complaint (R. 24-25) that it was made through "threats of reprisals" by the Brotherhood. Now that their own witness has admitted there were no threats of any kind (R. 167-168) and they no longer have any challenge to its validity, they would now have this Court join them in backing away from the issue on this bland assurance at page 45 of their brief:

> "We are not making an issue of any contract or so called collective bargaining agreements * * *".

The porters led the District Court into the manifest error of issuing the injunction order without any finding

or conclusion as to the April 27, 1944 contract. They also persuaded the Court of Appeals to affirm the injunction without mentioning the contract in its opinion. We cannot believe that this Court will be similarly induced to ignore the most vital element in the case, and thereby fail to recognize that the instant case is in direct conflict with the *Randolph* case.

The Santa Fe's brief (page 28) attempts to shrug off this issue with the suggestion "that the agreement would fall with the award." This theory supposes that since the agreement made in Chicago on April 27, 1944 did, among other things, settle the wage claims allowed by the Award and, according to the Santa Fe counsel's conjecture, the agreement "would not have been entered into except for the award" (R. 313), the contract was "impliedly" nullified by the Court of Appeals' decision that the Award was invalid (Br. 31). It is not surprising that the Santa Fe has cited no authority for the amazing proposition that an obligor who agrees to a compromise settlement of a disputed claim against him may thereafter litigate the disputed claim and be thereby released from his settlement agreement. The law is otherwise. As was said by the Supreme Court of Illinois in *Dougherty* v. *Duckles*, 303 Ill. 490, at 500:

> "A compromise of disputed claim made in good faith, whereby the claim is extinguished, is a sufficient consideration to support an agreement. Courts will not inquire into the merits of the claim to determine whether it could have been successfully maintained in a suit brought to enforce it. If the claim is entertained in good faith and the parties disagree as to its reasonableness or legality, its compromise affords sufficient consideration to support a promise or agreement."

It is therefore clear that the validity of the Santa Fe's agreement to assign brakemen to the disputed work does

not depend on the soundness of the Board's Award, and certainly not on the merits of the earlier dispute which the Santa Fe, after several months of collective bargaining, settled voluntarily by mutual agreement with the Brotherhood (R. 151, 167-168).

It is particularly important to note that this settlement by mutual agreement was made while the Santa Fe was still pressing its petition for rehearing in the Adjustment Board (R. 24), and while the carrier and the porters both considered the Award as not yet final (R. 161, 209). The Santa Fe's withdrawal of the petition for rehearing was not until a week *after* the settlement of April 27, 1944 (R. 134).

The history of the labor disputes which led to the agreements cannot change the ultimate fact that the agreements were made, or affect the right of the parties to make and perform them. In the *Randolph* case the agreement grew out of disputed claims which were settled in conference between union and carrier. In the instant case the agreement also grew out of disputed claims which were settled in conference between union and carrier. Is their right to make such a settlement through collective bargaining affected by the fact that some of the claims thus settled had been previously submitted to the Adjustment Board and were still being disputed there? Unless it can be based on this ground, we submit there is no room for distinguishing the two cases. None of the respondents has even suggested such a ground.

III.

Reply to Respondents' Arguments Concerning Knowledge and Notice of the Adjustment Board Proceedings.

The time has come, it is respectfully suggested, for this Court to settle the meaning of the Railway Labor Act provision for notice of hearings of the Adjustment Board as found in 45 U. S. C. A. Section 153 First (j):

> "* * * the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them."

The brakemen pointed out at page 33 of their brief that if a craft of employees is not entitled to intervene in an Adjustment Board proceeding it is not entitled to notice of the hearing. At page 32 the brakemen cited the case of *Order of R. R. Tel.* v. *New Orleans, Texas & Mex. Ry. Co.*, 156 F. 2d 1 (8th Cir. 1946), certiorari denied in 329 U. S. 758, which involved the Board's denial of an application to intervene made by one labor group during the consideration of a contract between the carrier and another labor group.

Apparently conceding that this case would be decisive of the question of whether the porters would be entitled to notice under the Railway Labor Act, the plaintiffs-respondents at page 58 of their brief attempt to distinguish the cases on the facts as follows:

> "In the case at bar, there is no such jurisdictional dispute involved and the case is not applicable to the facts alleged in the verified complaint in the instant case, nor the relief prayed for and therefore does not conflict with *Nord* v. *Griffin*, 86 F. 2d 481, which is directly in point."

The present argument of counsel for the train porters is particularly interesting: During a hearing in the trial court the brakemen suggested that if the porters had really believed that they were involved in the Adjustment Board proceedings they should have sought to intervene after the issuance of the Award and during the two years in which they knew that the carrier had pending a petition for rehearing. This is the answer made by the attorney for the porters at the trial court hearing (R. 200-A):

> "* * * Counsel says we should have intervened in that case. I am not going to argue that. The Order of Railroad Telegraphers, 156 Fed. 2d, says that the mediation act, the Adjustment Board Order, only provides for disputes between employer and employees and not between employees."

Notwithstanding this admission of counsel for the porters that the present dispute is between employees, both the trial court and the Court of Appeals held that the present case is within the rule of *Nord* v. *Griffin*, 86 F. 2d 481, even though that was a case in which an individual employee was held entitled to notice and hearing in a proceeding because it involved the interpretation of his own working agreement as applied to his individual seniority status.

With respect to the effect of knowledge of the Adjustment Board proceedings the porters argue at page 57 of their brief:

> "The petitioners attempted to substitute their bare statement of actual knowledge when the law requires the Board to give notice to employees involved, we do not believe such will receive the sanction of this Honorable Court."

This Court has expressed its disapproval of the practice of an employee standing by with knowledge of the

Adjustment Board proceedings and thereafter coming into court to complain that he was not notified. *Elgin, Joliet & Eastern R. Co.* v. *Burley*, 327 U. S. 661, at 666-667. Nevertheless, when the brakemen offered evidence in the trial court to show early actual knowledge it was excluded as immaterial (R. 258-263) and this ruling was tacitly approved by the Court of Appeals (R. 311-312, 345).

The Court of Appeals for the Seventh Circuit by its action has applied the Railway Labor Act provisions for notice of hearings of the Adjustment Board as follows:

> On hearings to interpret the collective bargaining contract of one craft the Board must give formal notice to employees of a rival craft although they could not intervene and be heard and although they have actual knowledge of the hearings. Failure to give such notice will void the Award.

Inasmuch as the Seventh Circuit has decided a federal question in a way probably in conflict with applicable decisions of this Court, this Court should state for the guidance of the railroad industry what is the correct interpretation of the Railway Labor Act provision for notice of hearings of the Adjustment Board as found in 45 U. S. C. A. Section 153 First (j).

Conclusion.

For reasons above stated, and those stated in our original brief dated April 5, 1949, we respectfully urge that this Court, in the exercise of its sound judicial discretion, grant the petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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